

Brinks Incorporated and United Federation of Security Officers, Inc., Petitioner. Case 29–RC–8914

May 12, 2000

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

The National Labor Relations Board, by a three-member panel, has considered objections to an election held November 21, 1997, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Election. The tally of ballots shows 177 for and 163 against the Petitioner, with 4 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, and has adopted the hearing officer's findings¹ and recommendations² as modified.

In this case, we are presented with the question whether the conduct of the Union's observer at the polls constitutes objectionable electioneering. We conclude, for the reasons stated below, that it does and that the election must be set aside and a new election held.

Union observer Muhammad told four employees, as each one approached the observer table, to vote for the Union. Further, one of these four employees (Rolean) told other employees, waiting to vote, what Muhammad had said.³ Muhammad also gave a "thumbs up" signal to still other employees as they approached the table.

The Employer's observer (Mayo) credibly testified that at the preelection conference both he and Muham-

mad were given instructions by the Board agent not to converse "with the people coming in." Also, the hearing officer credited Mayo's testimony that Muhammad was admonished for his conduct by the Board agent.

The hearing officer recommended setting aside the election. We agree that the election must be set aside for the reasons discussed below.⁴

In *Boston Insulated Wire & Cable Co.*,⁵ the Board explicated its duty to safeguard the election processes from conduct that inhibits the employees' exercise of free choice. The Board stated that:

In carrying out this duty, "the Board is extremely zealous in preventing conduct which intrudes upon the actual conduct of its elections." . . . Thus, the Board prohibits electioneering "at or near the polls."

. . . .

When faced with evidence of impermissible electioneering, the Board determines whether the conduct, under the circumstances, "is sufficient to warrant an inference that it interfered with the free choice of the voters." This determination involves a number of factors. The Board considers not only whether the conduct occurred within or near the polling place, but also the extent and nature of the alleged electioneering, and whether it is conducted by a party to the election or by employees. The Board has also relied on whether the electioneering is conducted within a designated "no electioneering" area or contrary to the instructions of the Board agent. [Citations omitted].

Analyzing Muhammad's electioneering in this case under the test set forth in *Boston Insulated Wire*, we conclude that an inference is warranted that it interfered with the free choice of the voters. First, Muhammad's electioneering occurred in the polling place. Second, Muhammad engaged in the electioneering while acting as the union observer, and he was thus an agent of the Union at the time of his misconduct. See *Dubovsky & Sons, Inc.*, 324 NLRB 1068 (1997). Third, Muhammad acted contrary to the instructions of the Board agent who conducted the election. Fourth, with respect to the "extent" of the conduct, we note that Muhammad directly told four employees how to vote; others were told what he had said; and still others were given the "thumbs up" signal. Finally, with respect to the "nature" of the conduct, we believe that party electioneering during the

¹ The parties have excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

We have also carefully reviewed the record and find no merit in the Petitioner's contention that the hearing officer demonstrated bias against Bashir Muhammad, the Petitioner's election observer and witness. Nor do we find any merit to the Employer's implication that the hearing officer demonstrated bias against the Employer.

² The Petitioner contends that the Regional Director erred in denying its request that the Board agent who conducted the election testify. The Petitioner requested that the Board agent testify as to whether Muhammad repeatedly left the observers' table and greeted voters, whether Muhammad engaged voters in conversation, and whether he requested voters to vote for the Petitioner. We note that both the Petitioner and the Employer presented witnesses regarding these issues and that the matter was fully litigated without the Board agent's testimony. In the circumstances of this case, we conclude that there was no abuse of discretion by the Regional Director.

We also deny the Employer's motion to strike the Petitioner's submission, which constitutes, in essence, the Petitioner's exceptions and brief. However, we do not rely on any representation contained in the Petitioner's submission which representation is not based on evidence contained in the record of this proceeding. The Employer also requests that the Board discipline the Petitioner's counsel. We find no basis for imposing discipline on the Petitioner's counsel.

³ The dissent ignores this fact.

⁴ The Union won the election with 177 votes to 163 "no" votes. There were 4 challenged ballots. The hearing officer concluded that the votes of the four voters whom Muhammad told to vote for the Union could make a difference in the results of the election. Therefore, she recommended setting aside the election. Although we agree that the election must be set aside, the votes of the four voters Muhammad told to vote for the Union would not have affected the election results. However, as noted above, more than these four employees were affected by Muhammad's conduct.

⁵ 259 NLRB 1118, 1118–1119 (1982), *enfd.* 703 F.2d 876 (5th Cir. 1983).

voting, and indeed in the election room, is a serious interference with the election process.

In sum, under each of the *Boston Insulated* factors, the conduct here was objectionable.

Our dissenting colleague acknowledges that Muhammad's conduct was inappropriate. She also notes that the correct standard for determining whether an election should be set aside because of electioneering at or near the polls is whether the circumstances of the electioneering warrant "an inference that it interfered with the free choice of the voters." However, she fails to analyze the facts of this case under the factors of that standard as outlined in *Boston Insulated*. Instead, our dissenting colleague relies on the hearing officer's finding that Muhammad did not greet voters "in the manner of an authority in control of the election." However, that is not the appropriate test. The relevant factor under *Boston Insulated* is whether Muhammad was an agent of a party. Clearly, he was such an agent. Further, as discussed above, Muhammad, while acting as the Union's observer and agent, defied instructions from the Board agent and, inter alia, told employees, in the final seconds before they cast their ballots, how to vote. Thus, Muhammad's behavior met the criteria set forth in *Boston Insulated* and it is therefore appropriate to draw "an inference that it interfered with the free choice of the voters."

We conclude that the election must be set aside and a new election held.⁶

[Direction of Second Election is omitted from publication.]

MEMBER FOX, dissenting.

Contrary to my colleagues, I would not adopt the hearing officer's recommendation to sustain the Employer's Objection 1(iii). The hearing officer found, based on his credibility determinations, that the Petitioner's observer, Bashir Muhammad, spoke or mouthed the words "vote yes" or "vote union" to four employees as they approached the check-in table at the voting place. The hearing officer concluded that this conduct constituted grounds for setting aside the election based on his finding that the ballots of these four voters, if affected by the conduct, would be sufficient to make a difference in the outcome of the election.

⁶ *General Dynamics Corp.*, 181 NLRB 874 (1970), is distinguishable. In that case the Board found that an observer's instruction to voters to mark their ballots for a union did not affect the outcome of the election. However, the conclusion in that case turned on a unique set of circumstances. The Board in that case acknowledged that the conversations in which the observer engaged "were of a magnitude which, in other circumstances, would require us to set aside the election." The election in *General Dynamics*, involved two petitioners. The wrongdoing observer was the observer for the losing petitioner and told employees whom he escorted to the polling place, as well as employees at the polling place, to vote for the petitioner, for which he was an observer. The employer objected to this conduct. If the objection were upheld, the losing petitioner would benefit. The Board noted that, "under a well-established legal principle we will not permit a wrongdoer to profit by the illegal act of its agent." In the instant case, setting aside the election will not benefit the wrongdoer, nor, for that matter, will it penalize an innocent party.

This latter finding of the hearing officer is in error. The tally of ballots shows 177 votes for the Petitioner, 163 votes against the Petitioner, and four challenged ballots. If, under the scenario most favorable to the Employer, the four challenged ballots were to be counted as "no" votes, the tally would become 177 votes for, and 167 votes against the Petitioner. Thus, the ballots of the four voters whom Muhammad encouraged to vote for the Petitioner, even if considered tainted, could not have affected the outcome of the election.

My colleagues acknowledge this mistake by the hearing officer but even so find that Muhammad's conduct warrants setting aside the election. In so doing, they rely also on his having given the "thumbs up" sign to several voters.¹

If the Board applied a per se rule that any electioneering in the voting place constituted grounds for setting aside the election, I might agree that this election should be overturned. But that is not the standard, which the Board uses to evaluate conduct of the type at issue here. Under the prophylactic rule set forth in *Milchem, Inc.*, 170 NLRB 362 (1968), the Board will automatically set aside an election on the basis of any "sustained" or "prolonged" conversations between a representative of a party and employees waiting to vote, without inquiring into the nature of the conversations. But where, as here, the allegedly objectionable electioneering does not involve prolonged conversations, the Board appraises the election "realistically and practically" to determine whether the conduct at issue is, under the circumstances, "sufficient to warrant an inference that it interfered with the free choice of the voters." *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118, 1118-1119 (1982) (citations omitted). Applying that standard to the facts as found by the hearing officer, I cannot conclude that the election should be set aside.

The hearing officer specifically found "no evidence that Muhammad, either seated or standing, greeted voters in the manner of an authority in control of the election." Thus, there is no reason to believe that employees regarded Muhammad as anything other than what he was—a union supporter acting as the Union's observer at the election. Muhammad's conduct was inappropriate, and I do not condone it. However, viewing the situation "realistically and practically," I cannot conceive of how merely seeing or hearing Muhammad mouth or speak the words "vote yes" or "vote union," let alone receiving from him a "thumbs up" sign, could have had so powerful an effect as to interfere with any voter's ability to exercise free choice. Accordingly, I respectfully dissent.

¹ Six employees testified that Muhammad gave them a "thumbs up" sign. Several of them testified that this occurred after they first gave him the thumbs up sign, and three said that it occurred after they had voted. The hearing officer found this conduct to be innocuous.